

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LAS VIRGENES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010031631

DECISION

Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings, State of California, heard this matter on June 22, 23, 24, 25 and 29, 2010, in Calabasas, California.

Student was represented by his parents (Parents), who were present throughout the entire hearing. Melissa Hatch, Attorney at Law, of Fagen Friedman Fulfrost, LLP, represented Las Virgenes Unified School District (District). Susan Curtis, Director of Pupil Services, was present on behalf of District on all hearing days. Assistant Superintendent for Education, Mary Schillinger attended the hearing in the afternoon on June 25, 2010.

On March 22, 2010, Student filed a request for due process hearing (complaint). On June 14, 2010, Student's request to amend the complaint to add additional issues was granted. At hearing, oral and documentary evidence were received and admitted. At the end of the hearing, a continuance was granted until July 13, 2010, to allow parties time to file closing briefs. The parties submitted their closing briefs within the time allowed, and the record was closed on July 13, 2010.

ISSUES¹

1) Did District deny Student a free appropriate public education (FAPE) for the 2009-2010 school year, because the October 29, 2009 individualized education program (IEP), as amended:

- a) Did not provide an appropriate placement; and,
- b) The related services of 90 minutes per week of speech therapy, and 30 minutes per week of behavior intervention services were inadequate?

2) Did District deny Student a FAPE for the 2010-2011 school year because the June 1, 2010 IEP:

- a) Did not provide an appropriate placement; and,

¹ On the first day of the hearing, Parents expressly waived their right to findings in this hearing on two procedural issues. The first issue was whether District denied Student a FAPE for the 2009-2010 school year by failing to implement Student's October 29, 2009 IEP, as amended on February 19, 2010, March 19, 2010, and March 26, 2010. The second issue was whether District denied Student a FAPE in formulating Student's October 29, 2009 IEP, as amended on February 19, 2010, March 19, 2010, and March 26, 2010 by (a) failing to accurately report Student's present levels of performance and (b) failing to set accurate measurable annual goals related to meeting Student's unique needs. At the hearing, Parents clarified that they were not making these allegations in the complaint, as amended, as separate claims of a procedural violation. Instead, Parents intended the allegations to provide evidence supporting Student's contentions that the District denied Student a FAPE and that placement in a non-public school was the appropriate placement.

- b) The related services of 67 minutes per week of speech therapy, 60 minutes per week of behavior intervention, and 47 minutes of daily specialized academic instruction in social skills were inadequate?²

FACTUAL FINDINGS

JURISDICTION, BACKGROUND, AND EDUCATIONAL HISTORY

1. Student is a 13-year-old boy who, at all relevant times, resided with Parents within the District and was eligible for special education services under the classification of autistic-like behaviors.
2. Student completed third and fourth grades, at ages eight and nine years, at Summit View School (Summit View), a non-public school (NPS), in the 2005-2006 and 2006-2007 school years. Student also attended the first semester of fifth grade in the 2007-2008 school year at Summit View. Student attended the remainder of the fifth grade, in 2008, at a District elementary school. Student completed sixth grade in the 2008-2009 school year at the District's Alice C. Stelle (AC Stelle) Middle School.
3. On November 21, 2007, while Student was at Summit View, District staff performed a multidisciplinary psycho-educational assessment to identify Student's educational strengths and weaknesses, including his then current levels of functioning.

² The issues in the due process complaint have been restated for purposes of organizing this Decision. Student raised issues in his closing brief that were not part of the complaint, as amended. District objected, and the objection was sustained. Those issues have not been considered in this Decision. "The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [complaint], unless the other party agrees otherwise." (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

District requested the assessment after Parents expressed an interest in returning Student to a District school. The results of the multidisciplinary assessment were compiled in a report prepared by District school psychologist Jeffrey C. Lough, M.S. N.C.S.P. Lough testified at the hearing.

4. Lough's assessment showed that, in 2007, Student's overall cognitive ability was within the borderline range. His verbal and nonverbal reasoning ability was fairly evenly developed. Student's working memory was deficient, which impacted aspects of Student's classroom functioning, including independence and academics. As a result, Student's acquisition of academic skills was likely to continue to occur at a slower rate than was expected by current-grade-level standards. In Lough's opinion, an increasing gap between Student's chronological age and his grade-level skills was likely to occur as higher order thinking and problem analysis demands on Student rose. Student's ability in concrete reasoning was stronger than his abstract thinking. Student's skills in rote knowledge were stronger than in application of knowledge. His reading decoding and fluency skills were stronger than his reading comprehension. Student demonstrated strength in his ability to process visual information, and his skills in visual-motor integration were strong. In Lough's opinion, in 2007, Student tended to have greater levels of anxiety and internal stresses than was typical of boys his age. Student also exhibited difficulty in joining in with his peers, which affected his ability to form meaningful relationships.

5. Summit View assistant director Carl Goodman (Goodman) testified at the hearing. Goodman testified that, while at Summit View, Student made accomplishments in all areas, including learning skills and his ability to socialize. Student was presented with grade-level curriculum at Summit View, but Goodman had no knowledge of whether Student was accessing all of the materials. Student's grades in third and fourth grades showed progress in most areas. Goodman testified that Summit View admits

students of average to above-average cognitive ability with specific learning disabilities and/or an eligibility of Other Health Impairment such as Attention Deficit Disorder. Summit View does not have a general education population and, if enrolled at Summit View, Student would have no access to typically developing peers. Goodman testified that Student had recently applied to Summit View for the 2010-2011 school year and that Summit View had accepted him. Goodman was unfamiliar with Student's present levels of performance (PLOPs) in the 2009-2010 school year. Goodman did not participate in the development of Student's 2009-2010 or 2010-2011 IEPs, and did not know whether Student had met or made progress toward his goals after leaving Summit View. Goodman did not have a specific recollection as to whether he had reviewed Student's 2009-2010 IEP and he did not perform any assessments of Student. Goodman offered no credible evidence relating to Student's 2009-2010 or 2010-2011 IEPs.

6. Summit View special education teacher Anne Studer (Studer) also testified at the hearing. Studer taught Student at Summit View when he was in the third and fourth grades. In the third and fourth grades, Student did well when instructed in small groups or one-to-one. He had difficulties storing and retrieving information. Student was more successful in Studer's class when visual cues were integrated into the presentation of subjects. He made progress with school work after overcoming the transition from public school to Summit View. Studer had no knowledge of Student's PLOPs or goals at the time of the hearing. Studer offered no credible evidence relating to Student's 2009-2010 or 2010-2011 IEPs.

7. District speech therapist Mindy Gold (Gold) testified at the hearing. Gold performed a SL assessment on Student in 2006 while Student was at Summit View. When Student returned to the District from Summit View in January 2008, Gold provided speech therapy services to Student until June 2008. Gold worked with Student for three, 30-minute sessions per week to address Student's SL needs, including deficits

in auditory processing and difficulty organizing thoughts and completing sentences. After the first week of instruction from Gold, during which Student transitioned from Summit View, he demonstrated no anxiety. Student appeared to Gold to be comfortable with his peers and with the teachers and aides working with him. Gold had no knowledge of Student's PLOPs at the time of Student's October 29, 2009 IEP or thereafter. She offered no evidence or opinions relating to Student's 2009-2010 or 2010-2011 IEPs.

OCTOBER 29, 2009 IEP

8. During the 2009-2010 school year, Student attended a Special Day Class (SDC) at AC Stelle.

9. District held Student's annual IEP for the 2009-2010 school year on October 29, 2009. The IEP team consisted of Parents, Student's special education math teacher and case manager Sharon Lee (Lee), speech therapist Jacque Jackson (Jackson), AC Stelle Vice Principal Josh Stephenson (Stephenson), teaching intern Pam Asher (Asher), and general education teacher Jessie Dickenson (Dickenson).

10. The October 29, 2009 IEP team members participated in discussion of Student's unique needs, his PLOPs, and his past and proposed future goals. The IEP team reviewed Lough's 2007 psycho-educational assessment report, Student's most recent standardized academic test scores, and Student's progress toward his 2008-2009 goals as reported by his teachers and service providers. The October 29, 2009 IEP team considered Parents' concerns regarding Student's homework habits, his dislike of school, his social issues and social skills, and Student's standards and levels of performance in his curriculum as they related to his grade level. Parents expressed concern that they wanted Student to perform at the seventh grade level. Parents also expressed concern that Student did not get along with special education teacher Nancy Schreiber's (Schreiber) teaching assistant in the 2008-2009 school year. Parents were concerned

because Student had reported that the teaching assistant had grabbed him by the neck during an incident in a computer lab.³

11. IEP team member Lee has bachelor's and master's degrees in therapeutic recreation. She has a credential in Special Education for Learning Handicapped, a credential to teach Multiple Subjects, and is a certified resource specialist. Lee has been employed by the District since 1998 as a special education teacher for sixth, seventh and eighth grades. She was employed in other districts as a teacher from 1988 to 1998.

12. Lee was Student's case manager and his teacher in core math and language arts elective classes in the 2008-2009 and 2009-2010 school years. Lee attended all of Student's IEP team meetings, communicated regularly with Parents, and routinely reviewed bi-weekly reports on Student's progress provided by Student's teachers and speech therapist. She was familiar with Student's school records, including assessment reports and test results. She frequently collaborated with Student's teachers and speech therapist, with Student's parents, and with other District staff who interfaced with Student during the school day. She also collaborated regarding Student's needs with the assistant principal, counselors and other District teachers if the need arose. Her responsibility as Student's case manager included being familiar with Student's IEP and ensuring that Student's accommodations and modifications to the curriculum were in place. Lee also observed and evaluated Student's performance in his math and elective language arts classes. Lee testified at the due process hearing. She demonstrated that she was qualified to offer opinions on Student's progress at the October 29, 2009 IEP team meeting, and toward his 2009-2010 goals at subsequent IEP team meetings throughout 2009-2010, including the June 1, 2010 IEP team meeting.

³ Student did not offer any credible evidence at hearing establishing that this incident actually occurred.

13. In Lee's opinion, at the time of the October 29, 2009 IEP team meeting, Student was a visual learner, and benefited from visual prompts in conjunction with oral presentations. Student had deficiencies in social behavior, in reading comprehension, in doing homework, in retentive memory, in following directions without repeated prompts, and in staying on task. Lee had not observed Student demonstrating anxiety in her sixth grade math class that interfered with Student's ability to benefit from his education. None of Student's teachers reported to Lee that they had observed Student demonstrating anxiety in their sixth grade classrooms that interfered with his ability to benefit from his education. Lee wrote some and collaborated on all of Student's 2009-2010 PLOPs, which addressed Student's unique needs at the time of the October 29, 2009 IEP. In doing so, Lee relied upon her observations of Student's performance in her sixth grade core math class and elective language arts class, including her evaluation of Student's progress in 2008-2009, and on Student's work in class, his homework, Student's worksheets and his classroom tests.

14. IEP team member Jackson has a bachelor of science degree in speech pathology and audiology and a master of science degree in speech and hearing science. She worked as an instructional assistant in special education prior to obtaining her degrees. She has worked as a SL pathologist for several school districts since 2002, including for District from 2008 through June 2010. Jackson provided speech therapy services to Student in the 2008-2009 and 2009-2010 school years. Jackson testified at the hearing. Based upon her education, experience and knowledge of Student, Jackson was qualified to offer credible opinions regarding Student.

15. Jackson provided SL services to Student in sixth and seventh grades, occasionally utilizing the assistance of a trained staff member and a speech pathology assistant when she was not personally available to provide services. She collaborated regularly in 2008-2009 and 2009-2010 with Student's teachers, his case manager, and

his parents. Jackson provided periodic follow-up reports on Student to Lee. She also collaborated with other speech therapists on strategies and techniques for students with SL deficits. Jackson collaborated with Lee in drafting Student's PLOPs and goals in communication.

16. In Jackson's opinion, at the time of the October 29, 2009 IEP team meeting, Student's expressive and receptive speech deficits were moderate. His deficit in auditory processing ability was moderately severe, although Student could process information and give feedback with minimal prompts. Student demonstrated moderate delay in response to verbal commands, and moderate to severe deficits in verbal syntax. Jackson wrote Student's communication goals for the October 29, 2009 IEP.

17. Special education teacher Schreiber has a bachelor of arts degree in education, minoring in Spanish and humanities, and a master's degree in education with an emphasis on remedial reading. She has supplemented her education with continuing education classes since receiving her master's degree. She is certified by the State of California to teach children with mild to moderate learning disabilities. She has taught special education students full-time for 15 years, and part-time for eight-and-one-half years. Schreiber has been employed with the District as a special education teacher since 2000. Schreiber taught Student's sixth and seventh grade Language Arts and Social Science classes with the assistance of an instructional aide. Schreiber provided progress reports to and regularly collaborated with Lee on Student's progress. Although Schreiber did not attend the October 29, 2009 IEP team meeting, Schreiber collaborated with Lee in the drafting of Student's PLOPs and goals for the October 29, 2009 IEP. Schreiber, who testified at hearing, demonstrated sufficient knowledge and experience to render credible and persuasive opinions regarding Student's unique needs and his progress in the sixth and seventh grades.

18. Science teacher Steve Birnbaum (Birnbaum) is a District special education teacher with a credential to teach children with mild to moderate disabilities. Birnbaum holds a bachelor of arts degree in education and is in the process of obtaining a master's degree in education. Birnbaum taught Student sixth- and seventh-grade science under a modified curriculum based upon Student's unique needs. Birnbaum collaborated with Lee, Student's other teachers and Jackson throughout the 2008-2009 and 2009-2010 school years. They regularly discussed the implementation of strategies to enable Student to access the curriculum based upon his unique needs, including the use of visual learning programs to enable Student to access his curriculum. Birnbaum was aware of Student's learning deficits and his strength as a visual learner from the time Student enrolled in his sixth grade science class. Although Birnbaum did not attend the October 29, 2009 IEP team meeting, Birnbaum participated in the 2009-2010 IEP statement of PLOPs and writing of goals by providing regular follow-up reports and collaborating with case manager Lee and Student's other teachers. Birnbaum testified at the due process hearing. He demonstrated sufficient knowledge and experience to render credible and persuasive opinions regarding Student's unique needs and his progress in the sixth and seventh grades.

19. The October 29, 2009 IEP team determined Student's unique needs based upon his PLOPs, his teachers' and his speech therapist's first-hand knowledge of Student, collaboration, teacher observations, work samples, grade reports, follow-up sheets and Lough's 2007 psychoeducational assessment report. Student's IEP team incorporated into his IEP self-help strategies presented by Student's teachers and speech therapist from which Student would benefit, thereby increasing his self-esteem as he acquired new skills. Lee opined that Student had the ability to become an independent learner with the use of multi-modal teaching strategies, accommodations such as visual cues, preferential seating, and utilizing slower rates of speech, redirection,

repeated instructions, and visualization techniques, all of which were incorporated into Student's IEP.

20. The IEP team established nine goals for Student, including two reading, one writing, two math, one social/emotional, and three communication goals. Student's 2009-2010 reading goals addressed Student's weakness in comprehension. The first reading goal was for Student to distinguish a main idea from supporting details and sequence events in a passage with 85 percent accuracy in four out of five trials. The second reading goal was for Student to restate facts and details in text to clarify and organize ideas with 80 percent accuracy in three out of four trials. Student's writing goal addressed Student's need to work on multi-paragraph essays, organization, capitalization and spelling. It provided for Student to write multi-paragraph essays with six or more paragraphs, including a main idea, supporting details, and a closing sentence, using correct grammar, capitalization and punctuation with 85 percent accuracy in three of four trials. Student's two math goals addressed Student's weakness in problem solving, and acknowledged his strengths in computation of math problems.

21. Student's social/emotional goal addressed Student's weakness in social situations, including working with a partner and in groups of his peers. Student's three communication goals addressed Student's need to learn skills to enable him to make friends and be more comfortable in social situations. Additionally, they addressed Student's ability to retell orally presented information in proper sequence using specific vocabulary with 80 percent accuracy in four of five trials. Finally, Student exhibited difficulties processing and responding to information presented verbally, which impacted his academic curriculum. The third communication goal was for Student to respond to specific "wh" questions based on curriculum, producing direct, concise, grammatically correct sentences in four of five occurrences for two trials. In Lee's

opinion, the October 29, 2009 IEP team designed Student's social/emotional and communication goals to also help increase Student's self-esteem.

22. No evidence was presented to demonstrate that Student's PLOPs were inaccurate. The evidence established that the 2009-2010 written goals expanded upon and incorporated Student's PLOPs. Student's goals in the October 29, 2009 IEP were based upon Student's unique needs known to the IEP team at the time. Lee, in collaboration with Student's IEP team and special education teachers, wrote Student's goals in a manner intended to better enable Student to achieve progress toward meeting those goals based upon his unique needs in SL, cognitive and adaptive functioning, and social/emotional behavior. The 2009-2010 goals were measureable by evaluating work samples and observation records. The goals were achievable based on curriculum modifications and on accommodations written into the IEP.

23. The October 29, 2009 IEP team offered Student placement and services for the 2009-2010 school year that included specialized academic instruction in math, English/language arts, science, and history/social science in a SDC for 72 percent of the school day, with a modified curriculum in some subjects. The District also offered Student mainstreaming in general education for 28 percent of the day in physical education (PE), lunch break, transition between classes and after-school activities. District offered SL services two times a week for a total of 90 minutes per week, and a social behavior class 30 minutes a week. District offered accommodations, which included preferential seating, tests in a small-group setting, more frequent breaks, on-task reminders, checking for understanding of directions and clarifying the purpose of directions, simplified delivery of instructions, and alternative response modes, including pointing, signed and oral. Parents signed their agreement to the IEP on October 30, 2009.

24. On February 2, 2010, Parents wrote to Lee expressing their concern that, while Student was making progress in some areas, they felt Student had more areas of deficiency in which he was not improving. Parents were also concerned that Student was performing below grade level.

25. On February 19, 2010, District convened an IEP team meeting. Parents, Lee, assistant principal Stephenson, general education PE teacher Katie Flanagan (Flanagan) and District representative Marjorie Baron were present. The IEP team discussed and considered Parents' concerns that Student was not performing at grade level and that Student's goals should include that Student complete work at the seventh grade level. Student's teachers reported that Student was making progress toward his October 29, 2009 IEP goals, and that accommodations in Student's IEP were being implemented. Lee and Schreiber reported that Student was happy and developing a sense of humor. They reported that Student had demonstrated improvements with his ability to follow school procedures and transitions. Flanagan reported that Student lacked social skills in PE. Student was unclear when asking questions or trying to explain something in class. Student had difficulty initiating small-group activities. Parents requested that Student be removed from the social behavior class because of their concern that Student was not willingly accessing or getting a benefit from the class. Lee credibly testified that Parents did not report at this meeting that they had concerns about Student's anxiety levels or that he felt unsafe at school. The IEP Team amended Student's October 29, 2009 IEP by removing the social behavior class, as parents had requested.

26. District reconvened the IEP team meeting from February 19, 2009, on March 19, 2010. The IEP team consisted of Parents, assistant principal Stephenson, Lee, and special education teacher Schreiber. The meeting was called to discuss Parents' concerns regarding Schreiber's methods of encouraging Student to take and turn in homework, and that Student was having problems with the notes from Birnbaum's

science class. Parents were also concerned that Student did not appear to be making progress toward his goals, that his grades in Schreiber's classes were dropping, and that he was not turning in homework in all of his classes. Parents were also concerned that speech therapist Jackson was not providing regular speech therapy services to Student.

27. At the time of the March 19, 2010 IEP team meeting, Student had shown improvement in reading and communication. His vocabulary was improving. Student was receiving instruction on multiple levels of comprehension and was reading well at all three levels. His ability to read and find answers in both language arts and social science had improved. Schreiber and Lee implemented techniques, accommodations and strategies from Student's IEP to enable him to make progress toward his communication, writing, reading and math goals. In addition, both Schreiber and Lee utilized visual learning programs to enable Student to engage his strengths as a visual learner. The IEP team discussed implementing additional options for Student to assist him in learning his curriculum. District also proposed that Student attend a reading class two days a week before school. Parents agreed with the proposed options.

28. At the time of the March 19, 2010 IEP team meeting, Student was accessing his curriculum and had made progress toward his 2009-2010 goals. Based upon Birnbaum's regular review of Student's work throughout the 2009-2010 school year and his experience with Student in the sixth grade, Birnbaum reported that Student's note-taking skills in seventh grade were very good and he did not require assistance with notes.

29. Lee and Schreiber discussed the tools they were using to help Student keep track of homework. Schreiber utilized specific tools for homework assignments which she applied to the entire class in order to avoid drawing attention to Student. Schreiber and Lee reported that Student had demonstrated improvement in turning in homework assignments. The IEP team discussed additional strategies for teaching

Student the necessary tools to accomplish the task of homework. The IEP team also proposed solutions for Parents to keep up with Student's grades, including accessing Student's on-line records.

30. The IEP team discussed Student's social skills, including his inability to initiate group interaction during group PE activities. Schreiber and Lee reported that they observed that Student was talking more to friends in their classes, to the point that Student was being reprimanded in class for talking while teachers were giving instruction. Schreiber and Lee observed that Student appeared happy and was developing a sense of humor, in comparison to a year prior where Student was more withdrawn and waited for numerous prompts to begin an assignment.

31. Parents did not report any concerns that Student was not benefiting from his education because of anxiety or concerns for safety. Parents made no request to move Student from Schreiber's class because of fear or anxiety issues.

32. Because Jackson was unable to attend the March 19, 2010 meeting, the IEP team, including Parents, agreed to continue the meeting on March 26, 2010, in order to address Parents' concern over Jackson's services.

33. District convened a continued IEP team meeting on March 26, 2010. IEP team members Lee, Flanagan, Jackson and Stephenson were present. Parents, who had given their consent to the meeting on March 19, 2010, did not attend.

34. Speech therapist Jackson reported that Student was making progress toward his communication goals with the assistance of visual cues. Jackson testified credibly that she, or a qualified assistant, met with Student two times a week in a small group. Jackson reported that Student demonstrated progress in acquiring new vocabulary throughout the 2009-2010 school year. The IEP team also discussed Student's continued inability to initiate group involvement during PE, even with numerous prompting from Flanagan.

35. Lee proposed four new goals for Student, two in math, and one each in writing and reading, because Student had met his original reading, writing and one of two math goals. Based upon Parents' concerns regarding Student's levels of performance expressed at the February 19 and March 19 IEP team meetings, the IEP team recommended that District conduct an early triennial assessment of Student. District sent Parents an Assessment Plan, to which Parents consented in writing on March 28, 2010.

TRIENNIAL ASSESSMENTS – MAY 2010

36. District conducted a multidisciplinary assessment of Student in May 2010. As part of the assessments, Lee assessed Student's academic achievement utilizing the Woodcock Johnson Test of Achievement, Third Edition, Form B, Normative Update (WJ-III NU). Based upon Student's standard scores in the ten subscales, Student performed in the low-average range in academic skills and fluency with academic tasks. His ability to apply those academic skills was within the low range. Student's standard scores were low-average in broad reading, broad mathematics, math calculation skills, broad written language, written expression, and brief writing. His standard scores were within the low range in mathematics.

37. School psychologist Arda Baboglian (Baboglian) conducted a psycho-educational assessment of Student on May 12 and May 13, 2010. She compiled the assessment results in a report dated May 13, 2010. Baboglian has a bachelor of arts in psychology, a master of arts in educational psychology, and a master of arts in school counseling. She holds a California State Pupil Personnel Services credential. Baboglian has been employed by District as a school psychologist since 2005. She worked at various other school districts in the area of school counseling and school psychology in 2004 and 2005 until she began her employment with District. Baboglian is licensed to work with students with severe developmental disorders. Baboglian's job duties with

District include conducting assessments, initial and triennial evaluations, participation in IEP team meetings, and student study team meetings. She is also responsible for addressing concerns of parents of children with special needs and learning disabilities. She provides behavior intervention and counseling services for students with social/emotional difficulties in both individual and group settings. Baboglian also collaborates with parents, teachers and professionals of special needs students to discuss their concerns.

38. Baboglian's assessment of Student included a review of Student's records, a parent questionnaire, teacher and staff reports and consultation, and Student observations and interviews. Baboglian administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-4); the Beery-Buktenica Developmental Test of Visual Motor Integration Skills, Fifth Edition (VMI); the Beery VMI Developmental Test of Visual Perception, Fifth Edition; the Learning Efficiency Test, Second Edition (LET-II); Achenbach Child Behavior Checklist (CBCL); Achenbach Youth Self-Report (YSR); and the Achenbach Teacher Report Form (TRF). Baboglian relied upon the Adaptive Behaviors Evaluation Scales, Second Edition-Revised (ABES-R2) for home and school, and the Gilliam Autism Rating Scale, Second Edition (GARS-2) for home and school. Baboglian also utilized the Myself Checklist, Three Wishes, and Sentence Completion tests. Baboglian administered the assessment tests in a non-discriminatory manner, and in accordance with the test maker's instructions. The tests were tailored to assess specific areas of Student's educational needs.

39. Baboglian testified at the hearing. Based upon her education, background, and knowledge of Student through her assessment, Baboglian demonstrated that she was qualified to render credible and persuasive opinions relating to Student's unique needs.

40. Baboglian administered 10 subtests of the WISC-4 to Student. Student's verbal comprehension index (VCI) was in the tenth percentile, classified as low-average. Student's perceptual reasoning index (PRI) was in the fourth percentile, classified as borderline. Student's working memory index (WMI) was in the thirteenth percentile, classified as low-average. Student's processing speed (PSI) was in the fourth percentile, classified as borderline. Student's full-scale intelligence quotient (FSIQ) was 72 which fell into the third percentile and was classified as borderline. In Baboglian's opinion, Student demonstrated an increase in verbal reasoning and working memory from his 2007 scores. Student scored in the 21st percentile on the VMI, falling in the below-average range when compared to same-aged peers. Compared to his reasoning abilities, Student's visual-motor integration skills were better developed and his sensory-motor skills were a relative strength for Student. The results on the VMI were consistent with previous assessment results. On the Beery VMI Developmental Test of Visual Perception, Fifth Edition, Student scored in the 63rd percentile, falling in the average range. Student's scores demonstrated that he exhibited a relative strength in visual perception. Student's scaled standard scores on the Let-II were 114 in visual, 73 in auditory, and 88 in global memory. In Baboglian's opinion, Student's global memory fell within the low-average range. On the ABES-R2, Student's adaptive skills quotient was 71, which fell below normal age expectancies and indicate a lag in adaptive behavior compared to boys of Student's age.

41. The CBCL reflected Student's mother's responses to a checklist and a report from Schreiber's report. Student's total problems, internalizing and externalizing scores were all in the clinically significant range above the 90th percentile for boys aged 12 to 18. Student's scores on the withdrawn/depressed, social problems, thought problems and attention problems syndromes were in the clinical range above the 97th percentile. Student's scores on the anxious/depressed and aggressive behavior

syndromes were in the borderline clinical range. Student's scores on the CBCL indicated that Student's mother reported more problems than are typically reported by parents of boys aged 12 to 18, and suggested that Student may demonstrate more behaviors in the home where it is more comfortable and less structured. Student may also maintain proper behaviors during the school day, as opposed to at home which can be used as an outlet for Student to unwind. On the TRF and YSR problems scales, Student's scores on the total problems, internalizing and externalizing, were in the normal range for boys 12 to 18. Student's scores on all rated scales were in the normal range. Student's scores on the GARS-2 were 94, as reported by both Student's mother and Schreiber, and placed Student in the "very likely" range of the autism index.

42. Baboglian also administered to Student the Three Wishes, Sentence Completion, and Myself Checklist exercises to determine Student's self-assessment. Student responded to the Three Wishes test with the single response that he wanted "to do well in school." Student's responses to the Sentence Completion exercise suggested that Student was happiest when he was sleeping, that he sometimes worried about his grades and doing well in school, that he felt other people laughed and had fun with him, and that he got upset when "going to work." Student indicated that he "need(s) help with nothing" and reported that his life is "good and everything is fine." Student's responses on the Myself Checklist were favorable in nature, suggested that he felt good about himself and his physical image, that he had developed good friendships and that he felt happy. He expressed some uncertainty with his spelling skills and decision-making ability. He was honest about not liking school most of the time.

43. In Baboglian's opinion, the assessment and test results accurately reflected Student's aptitude, achievement level and other factors the tests purported to measure. The tests, assessment materials and procedures were validated for the specific purpose

for which they were used. The results were considered valid for Student. Parents offered no evidence to demonstrate that the assessments were invalid.

44. As part of her assessment, Baboglian interviewed Lee, Birnbaum, Flanagan, Schreiber, and the school librarian. Based upon the teacher and librarian interviews, and her own observations of Student in the classroom, Baboglian opined that Student was progressing in meeting his 2009-2010 goals in peer interactions. Student did not report, and Baboglian did not observe, signs of insecurity or low self-esteem during her assessment. Student had difficulty socializing, which was a characteristic of Autism. Student's ability to initiate and maintain peer interactions had improved. However, he was still unable to read social cues, which is also characteristic of students with Autism. Student demonstrated weakness in auditory processing, comprehension, retention of orally presented material, and a slow response time. Based upon Student's unique needs, Student benefited from a multi-modal teaching approach that included reinforcement and visual prompts and cues.

45. Baboglian was aware of Parents' concern over Student's anxiety at the time of her assessment. During her observations and testing, including observations in Schreiber's classroom in the presence of Schreiber's educational assistant, Baboglian did not observe Student exhibiting signs of anxiety. Student's teachers similarly reported to Baboglian that Student had demonstrated no evidence of anxiety in their respective classrooms. Baboglian's evaluation of Student's anxiety level was based upon her own assessments and observations, as well as those reported by Student's teachers. Student's inability to socialize was the primary social/emotional factor impacting Student's learning, not anxiety.

46. Baboglian recommended accommodations, interventions and strategies for use by Student's teachers. The accommodations included multi-modal teaching, nonverbal and verbal prompts for attention redirection. She recommended that Student

attend a social skills class and that Student either participate in a strategies and studies skills class or that Student's teachers incorporate those strategies and skills through classroom accommodations. She also recommended as accommodations positive reinforcement, providing copies of classroom notes to supplement Student's notes, smaller settings for test-taking, and chunking information to smaller more manageable units.

47. Baboglian concluded that Student's overall achievement is at a rate higher than suggested by his FSIQ score. Student's overall test scores suggest that Student has learned compensatory strategies to assist him with his academics. Student's scaled scores on standardized assessments were a more reliable indicator than age and grade equivalence scores, and are used more often in the industry than grade-level performance to evaluate students similar to Student.

48. District Applied Behavioral Analysis (ABA) therapist Victoria Willig (Willig) performed a behavioral assessment of Student from April 2, 2010, until May 20, 2010. Willig has a bachelor of arts degree in recreation, and a master of arts degree in education. She holds a general education credential, Level One and Level Two special education credentials, and is qualified to teach special education students with moderate to severe deficits. Willig has taken numerous training courses in ABA behavior and curriculum. She has provided consulting services for children with Autism since 1999. She has worked in the field of education for more than 35 years. Willig currently works for District as a teacher on special assignment as an ABA specialist. She has worked as a special education teacher for District for 12 years, mainly in the area of Autism. Her job duties include training staff and teachers in ABA therapy, including providing two-day and four-day training sessions. Willig does not provide direct behavior services to students. She develops programs for students who require behavioral services and oversees the instructional specialists who deliver the services to

students. Willig testified at hearing. Based upon Willig's background, experience and knowledge of Student acquired through observation and assessment, Willig demonstrated that she was qualified to render credible opinions relating to Student's unique needs and goals.

49. Willig's assessment included four observations of Student in the classroom setting, evaluation of Student's compliance, flexibility, social skills, learning to learn skills, and disruptive behaviors. In the area of compliance, Willig also observed Student complying with instructions when given follow-up instructions. Student correctly answered a question when asked directly. Student demonstrated difficulty staying on task, listening to the teacher and getting started. Student demonstrated progress during Willig's observations in following instructions more quickly and in staying on task longer. In the area of flexibility, Student maintained appropriate behavior. He accepted corrective feedback and was once observed to use the corrective feedback to change his behavior. In the area of social skills, Willig observed Student demonstrating improvement in engaging with peers and in responding to peer comments. He volunteered information in his small-group speech therapy class without extra encouragement from the speech therapist. In the area of learning to learn skills, between Willig's first observation and the third and fourth observations, Student showed progress in applying acquired skills. Student was prepared, responded quickly to directions, and demonstrated excitement to his teacher, Lee, when he accomplished the task he was engaged in. Student did not engage in disruptive behaviors during observation, although he demonstrated attention difficulties during two observations.

50. Willig prepared a written report including findings and recommendations. Willig recommended that Student receive behavior services both in a one-to-one setting and in a small-group setting. She recommended that Student needed to work on consistency in peer interactions, and to be a more active participant with peers. Willig

concluded that Student would benefit from learning new self-advocacy skills. Willig collaborated with Student's teachers and developed a proposed behavior intervention plan.

51. Speech therapist Jackson assessed Student on April 21, April 28, May 5, and May 12, 2010. Jackson administered the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4), the Test of Auditory Processing Skills, Third Edition, including nine subtests (TAPS-3), the Comprehensive Assessment of Spoken Language including three subtests (CASL), and the Test of Pragmatic Language, Second Edition (TOPL-2). Student appeared to give maximum effort to responding during the four assessment sessions. Student's standard score on the PPVT-4, which tested Student in receptive vocabulary and comprehension for the spoken word in English, was 83. Student's score placed him in the ninth percentile of typical peers. His overall language standard score on the TAPS-3, which tested Student's use of auditory information, was 88. Student's score reflected an increase from his previous score of 53. Student's score was in the 20th percentile of typical peers, demonstrating that auditory processing was a weakness for Student. Student's standard scores on the CASL were 83 for synonyms, 83 for grammaticality judgment, and 73 for pragmatic judgment, which increased from his prior standard score of 50. Scores equal to and above 85 are within normal limits of language fundamentals. Student's scores on the CASL indicated increases in his language skills from prior assessments. Student's standard score on the TOPL-2 was 79, which in Jackson's opinion indicated that Student was weak in his ability to judge or respond to specific social situations. In Jackson's opinion, at the time of her assessment, Student had made a significant improvement in receptive and expressive language standard scores. She recommended that Student should continue receiving some SL services in a small-group setting, and she wrote two communication goals to address Student's

unique needs in communication. Jackson reported her findings in a written report dated June 1, 2010.

52. District held an IEP team meeting on June 1, 2010. The IEP team consisted of Parents, Lee, Schreiber, Birnbaum, Flanagan, Jackson, Willig, Stephenson, Baboglian, and Secondary Program Specialist Angie Falk. District's attorney Melissa Hatch was also present. The purpose of the meeting was to discuss Student's triennial assessments and his PLOPs as reported by his teachers and speech therapist. Parents were provided a copy of Baboglian's and Willig's reports, and a draft of Jackson's June 1, 2010 SL report.

53. Birnbaum credibly testified at the hearing that Student made more progress in his seventh grade science class than in the sixth grade. Birnbaum regularly tested Student for comprehension by monitoring Student's engagement in discussion and by questioning Student to determine whether Student was memorizing instead of comprehending. Student's participation and interaction with other students in science class increased in the second half of the school year. During seventh grade, Student required minimal one-to-one instruction and his class notes were very good. Schreiber and Lee credibly testified that by the end of the 2009-2010 school year, Student had made progress in each of their classes in communication and social skills, math, and language arts. All three teachers regularly utilized visual learning tools in the classroom to enable Student to engage his strengths as a visual learner.

JUNE 1, 2010 IEP TEAM MEETING

54. The June 1, 2010 IEP team discussed Student's assessment results. Parents expressed concern that Student's unique needs were not being met. When asked for more details, Parents declined to go into specifics other than to state that all of Student's unique needs were not being met. Student's father inquired as to whether Student was meeting grade-level standards in math. District staff explained that some of the skills Student worked on in math were at seventh-grade standards, but most of the

work was modified leading up to a grade-level standard. Parents also expressed concern that Summit View was the appropriate placement for Student and that Summit View could better meet Student's unique needs. When District staff asked Parents for more details on their reasons for requesting Summit View over a District school, Parents declined to elaborate further.

55. The IEP team discussed Student's unique needs, his PLOPs and his progress toward his goals in 2009-2010. Student met six of his nine IEP goals and he made academic and social progress. His progress and present levels of performance were measured in part by teacher observations and student worksheets in each of his classes.

56. Student's June 1, 2010 IEP included thirteen measurable goals addressing Student's unique needs as determined at the time, including four social/emotional, two reading, three writing, two math, and two communication goals. The IEP included a list of fifteen accommodations which were incorporated from Baboglian's recommendations. Student's IEP team contemplated incorporating other of Baboglian's recommendations as part of the overall classroom teaching strategies offered to all students in the classroom. The IEP included recommended curriculum modifications in Student's academic subjects. The District's offer on June 1, 2010, consisted of specialized academic instruction in a SDC at a District school 72 percent of the school day with a core curriculum consisting of English/language arts, math, science, and history/social science. District also offered 60 minutes weekly of small-group SL services, behavior intervention services in the amount of 60 minutes per week, and 47 minutes of daily specialized academic instruction in social skills. District also offered general education 28 percent of the time, including PE, lunch and passing periods, and after-school activities. District also offered 23 days of extended school year (ESY) for the 2010 school year, including 30 minutes per week each of SL and social skills class. Parents disagreed

with the goals and services offered by District, but signed the IEP authorizing District to implement the IEP.

57. In Jackson's opinion, the IEP team appropriately reduced the number of SL services from 90 minutes a week to 60 minutes a week based upon Student's 2009-2010 PLOPs and his progress toward his communication goals in the 2009-2010 school year. In Jackson's opinion, Student no longer required 90 minutes of SL. District's offer of two 30-minute small-group sessions of SL therapy weekly was sufficient for Student to receive an educational benefit and to access his curriculum and make progress toward his communication goals. Jackson concluded that the 2010-2011 IEP was designed to provide Student additional support with his unique needs in communication through his special education core classes, during PE and in his social skills class.

REVIEW BY NEUROPSYCHOLOGIST DANA CHIDEKEL, PH.D.

58. Neuropsychologist Dana Chidekel, Ph.D., testified for District at the hearing. Chidekel is board-certified with the American Board of Pediatric Neuropsychology, and the American Board of Professional Neuropsychology. She has a master of arts degree in psychology, and a Ph.D. in clinical psychology. Eighty-five percent of her clinical practice in psychology is focused on pediatric issues in children with developmentally based problems. As part of her practice, Chidekel participates in IEP team meetings, usually on behalf of families whose child she has evaluated. Her credentials include clinical and research experience in psychology and neuropsychology since 1989, as well as numerous publications, professional and public presentations, and professional affiliations in the area of neuropsychology. Chidekel demonstrated that she is qualified as an expert in the area of pediatric neuropsychology.

59. Chidekel recently conducted a review and analysis of Student's 2009-2010 and 2010-2011 IEPs, his school records, academic test scores, Lough's 2007 report, and District's 2010 multidisciplinary reports, in preparation for hearing testimony. Chidekel

also met with Student's teachers and District behaviorist Willig. She observed special education classroom instruction at AC Stelle and at Summit View. Chidekel demonstrated that she was qualified to render credible opinions relating to Student's unique needs, his levels of performance, his goals, his October 29, 2009 IEP as amended, his June 1, 2010 IEP, and appropriate placement.

60. Chidekel reviewed and compared Student's scores on the WISC-4 from 2007 and 2010. Student's full-scale IQ of 72 is in the borderline range and is consistent with his score from 2007. Student's scores in verbal skills increased in 2010 from the second to the 10th percentile. Although Student's scores in processing speed inexplicably went down in 2010, the scores in processing speed are an indicator of the difficulty level student will experience at school and the level of support he will require. The scores are not an indicator of progress in school work.

61. Chidekel analyzed and compared Student's standard scores on the WJ-III from Lough's report in 2007 and his March 2010 WJ-III NU scores. Student's March 2010 standard scores demonstrate that Student has improved in all areas except punctuation and capitalization. Evaluating a student's scores solely based upon grade-level performance is not an accurate measure of a student's performance or ability. Standard scores are used industry-wide and are more reliable. Student's standard scores on the WJ-III NU were higher than his FSIQ. The difference in Student's FSIQ score and WJ-III NU scores demonstrated that, at the time of his June 1, 2010 IEP, Student was able to access his curriculum at a level beyond expectation, and he was achieving higher than his intellect level predicted.

62. Based upon Student's unique needs in memory and retention, Student would benefit from multi-sensory teaching techniques that provided him with visual prompts. Prompts included the use of PowerPoint and Elmo projections, instructions written on the board, pictures and graphic presentations. Such a multi-sensory approach

was designed to unburden Student's working memory to allow for comprehension and retention of materials. Chidekel did not support, as suitable for Student, the use of teaching techniques that heavily emphasized visual learning as opposed to a multi-sensory approach. Her opinion was credible and consistent with Baboglian's opinion on this issue.

63. Based on Student's unique needs, Student would benefit from placement in a special education class with a general education component which would enable Student to interact with typically developing peers. Student would also benefit from participation in ESY in order to achieve continuity and not lose skills until the next regular semester.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. For the 2009-2010 school year, Student contends that the October 29, 2009 IEP, as amended, denied him a FAPE by placing him at a District middle school in a SDC with some mainstreaming. Specifically, Student contends that his needs were too severe to be placed in a mild to moderate SDC at a District school, and that a more restrictive setting in a NPS, like Summit View, was the appropriate placement; that District did not have an accurate understanding of Student's unique needs as reflected in his PLOPs; that his grade-level performance dropped after he left Summit View and attended AC Stelle; that a teacher's aide caused Student anxiety and therefore deprived him of educational benefit; that his teachers at AC Stelle implemented different methods of handling homework assignments, which led to Student's heightened anxiety at school; that District teachers did not teach Student to effectively take notes, which also led to his anxiety about doing well in school; and that District teachers did not implement visual-based teaching methods to enable Student to perform at grade level.

(Issue 1a.) Student also contends that for school year 2009-2010, District denied Student a FAPE because the services in SL and behavior intervention offered and delivered by District failed to address his unique needs, and that District's offer of 90 minutes per week of SL services and 30 minutes per week of behavior intervention services did not offer or implement appropriate supports and services designed to enable Student to achieve grade-level performance. (Issue 1b.)

3. For the school year 2010-2011, Student contends for similar reasons that he was not offered a FAPE in the June 1, 2010 IEP because placement in a SDC in a District school with some mainstreaming was not appropriate to meet his needs or designed to help him achieve grade-level performance and that the appropriate placement for him was a NPS, specifically Summit View. (Issue 2a.) Student further contends that District denied Student a FAPE for the 2010-2011 school year because the related services of 67 minutes per week of speech therapy, and 60 minutes per week of behavior intervention were inadequate to address his unique needs; that District inappropriately reduced SL services from 90 minutes per week to 67 minutes weekly; and that District did not offer appropriate supports and services designed to enable Student to achieve grade-level performance. (Issue 2b.)

4. District disagrees and contends that at all times it provided, and/or offered Student a FAPE. Specifically, District contends that the placement in the October 29, 2009 IEP, as amended, was both appropriate and the LRE because Student attended school in his home district with some exposure to typical peers and he made educational progress; that Student received educational benefit in the 2009-2010 school year; that Student's teachers understood Student's unique needs based upon past assessments and their personal knowledge of Student; that Student's teachers delivered instruction, using appropriate modifications and accommodations to address Student's unique needs; and that Student made progress toward some, and met others, of his

2009-2010 goals at AC Stelle. (Issue 1a.) District also contends that Student received 90 minutes per week of SL services; that it offered Student 30 minutes per week of behavior intervention; that Student did not willingly access behavior intervention services; that, at Parents' request, District amended Student's IEP to remove the behavior intervention services and that Student nevertheless demonstrated improvement in his social/emotional skills while at AC Stelle. (Issue 1b.)

5. As to District's June 1, 2010 offer of placement, for similar reasons, District contends that District's offer of placement for the 2010-2011 school year as specified in Student's June 1, 2010 IEP was the appropriate placement in the LRE; that it had ample data showing that, in the 2009-2010 school year, Student made progress academically and socially at AC Stelle; and that a SDC with mainstreaming during the 2009-2010 school year continued to be an appropriate placement. (Issue 2a.) District also contends that, based upon the information available to the IEP team at the time, the June 1, 2010 IEP was reasonably calculated to offer Student educational benefit; that the June 2, 2010 IEP offered supports and services that addressed Student's unique needs, including modifications and accommodations based upon the recommendations of Student's teachers, service providers, and those who assessed Student; and that, based upon Student's unique needs as demonstrated by recent multidisciplinary assessments, the June 1, 2010 IEP included appropriate related services in SL, behavior intervention and a social skills class that addressed his unique needs. (Issue 2b.)

6. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) A FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction

and services”), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

7. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

8. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. 2010) 110 LRP 40439, 2010 WL 2735759.)

9. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the LRE. (*Ibid.*; *Rowley*, 458 U.S. at 188-89.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

10. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209.) This also applies to disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

11. School districts are required under the IDEA to provide each special education student with a program in the LRE, with removal from the regular education

environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116. (2006).)

12. The Ninth Circuit Court of Appeals has developed a four-part test to determine whether a student can be satisfactorily educated in a regular education environment. The Court has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class;" 2) "the non-academic benefits of such placement;" 3) the effect [the student] had on the teacher and children in the regular class;" and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

13. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, supra, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

ANALYSIS OF FAPE – 2009-2010 SCHOOL YEAR

Issue 1a – Placement

14. Student failed to meet his burden of demonstrating by a preponderance of the evidence that he was denied a FAPE because his placement for the 2009-2010 school year was not appropriate. He offered no evidence that Student's placement at AC Stelle was inappropriate, that he required a more restrictive environment than AC Stelle, that the District teachers did not understand and address his unique needs with appropriate teaching strategies and techniques, that his teachers did not effectively teach him to take notes, implement visual-based teaching methods, or implement methods to ensure that Student did homework, or that he suffered from anxiety that was caused by his placement at AC Stelle.

15. On the other hand, Student's October 29, 2009 IEP, as amended on February 19, March 19, and March 26, 2010, contained nine goals that addressed Student's unique needs known to the IEP team at the time. The evidence established that Student's goals were designed to address Student's unique needs in reading

comprehension, writing skills, math problem solving, communication, and social skills. The goals also addressed Student's weakness in cognitive and adaptive functioning, and SL. The October 29, 2009 IEP included adapted curriculum out-of-level, and a variety of accommodations and teaching strategies that addressed Student's unique needs in cognitive and adaptive functions, and social/emotional behavior. Student's IEP contained measurable goals designed to address Student's unique needs and that were reasonably calculated to provide Student with some educational benefit.

16. Lee, Birnbaum and Schreiber also understood Student's unique needs and they were qualified to deliver instruction to Student. They regularly incorporated visual prompts and tools as part of delivering curriculum to Student to address his strengths as a visual learner. They implemented strategies and techniques to assist Student in note-taking and homework, and Student demonstrated improvement in those areas during the 2009-2010 school year. The evidence established that, in his placement at AC Stelle, Student made progress toward all of his goals, he met three of his goals before the end of the year, and his social skills and relationships with his peers improved during the school year.

17. The evidence established that Student obtained educational benefit at AC Stelle in the 2009-2010 school year. In the area of Student's cognitive and adaptive functioning, Student demonstrated progress toward all, and met three, of his academic goals, with his teachers utilizing a multi-modal teaching approach. For example, Student met three of his 2009-2010 goals, in math, reading and writing, before the end of the school year prompting Lee to draft four new goals for Student at the March 26, 2010 interim IEP team meeting. Student's 2010 assessment and test scores demonstrated that he had made progress during the 2009-2010 school year, notwithstanding that he was performing below grade level in some areas. Student's academic performance in 2009-2010 exceeded expectations based upon his standard FSIQ scores. Student received

educational benefit from the use of a multi-sensory approach of teaching that included visual tools, including use of PowerPoint and Elmo projections, instructions written on the board, pictures and graphic presentations. Additionally, the evidence established that Student's teachers delivered Student's curriculum using numerous accommodations, including preferential seating, and test-taking accommodations. The IDEA does not require that District provide instruction to maximize Student's potential in school year 2009-2010. Nor was District required by the IDEA to ensure that Student performed at grade level in all subjects. The IDEA similarly does not require District to implement specific teaching techniques and strategies, implement methodology or place Student in programs requested by Parents, as Student contends.

18. Student also did not establish by the preponderance of evidence that anxiety was a factor impacting his placement. Student did not demonstrate signs of anxiety in their classes that related to Student's placement or that impacted Student's access to his education. Parents did not report any concerns at the February 19 or March 19, 2010 IEP meetings over Student's anxiety. Nor did Parents ask District to transfer Student out of Schreiber's classroom, where Student allegedly had a bad experience causing him prolonged anxiety. Student did not offer any evidence to establish that the alleged incident actually occurred. Student's learning deficits were attributable to Student's diagnosis of Autism rather than to evidence of anxiety or low self-esteem.

19. In the 2009-2010 school year, Student obtained academic and non-academic benefit from his placement at AC Stelle in a SDC class with a modified curriculum and with mainstreaming 28 percent of the school day. On the continuum of program options, Student's placement for the 2009-2010 school year in a SDC, with modifications and accommodations, and with mainstreaming 28 percent of the school day was a FAPE in the LRE. (Factual Findings 1, 5, 8-53; Legal Conclusions 1, 6-19.)

Issue 1b – Related Services

20. Student failed to meet his burden of demonstrating by a preponderance of the evidence that he was denied a FAPE in the 2009-2010 school year because the related services in SL and behavior intervention offered and implemented by District were not designed to enable Student to achieve grade-level performance. Student offered no evidence that the SL and behavior services offered and implemented by District were not designed to enable Student to make progress toward his goals.

21. The evidence established that during the 2009-2010 school year, Student received SL services in small-group sessions from District staff, including Jackson, as called for in the IEP. Student was making progress in his communication skills during the 2009-2010 school year. Techniques, accommodations and strategies from Student's IEP were implemented to enable Student to make progress toward his communication goals, including seeking verbal responses from Student to ensure that he understood directions and instruction. Student also engaged in small-group activities and interaction with his peers in his special education academic and general education PE classes. He also had opportunities to interact with typical peers during lunch, recess and after school, which provided opportunities for Student to work on communication skills.

22. Regarding behavior intervention services, the evidence established that District offered behavior intervention services in the form of a weekly 30-minute social skills class. By February 2010, Parents believed that Student was getting no benefit from the social skills class. At Parents' request, District amended Student's IEP and removed the social skills class after the February 19, 2010 IEP team meeting. Student demonstrated progress during the 2009-2010 school year in the area of social interactions, he appeared happy and he interacted more frequently with his fellow students. Student's teachers implemented accommodations and strategies in the

classroom, including during small-group activities, designed to address Student's social skills.

23. The evidence established that for school year 2009-2010, District's offer in the October 29, 2009 IEP, as it was amended in February and March 2010, of related services in SL and behavioral intervention was designed to, and did, provide Student with a FAPE. (Factual Findings 1,15, 19, 21, 23, 25, 27, 30, 34, 49, 51; Legal Conclusions 1, 6-10, 20-23.)

ANALYSIS OF FAPE – 2010-2011 SCHOOL YEAR

Issue 2a – Placement

24. Student did not meet his burden of establishing that placement offered by District in its June 1, 2010 IEP was inappropriate to meet his needs, not designed to help Student make progress toward his goals, or that it denied Student a FAPE. Student also did not meet his burden of establishing, as Student contends, that a NPS in a more restrictive environment is an appropriate placement.

25. The evidence established that, by the time of the June 1, 2010 IEP team meeting, District had acquired a significant amount of evidence that Student had made progress toward, and met some of, his goals at AC Stelle during the 2009-2010 school year. Student's June 1, 2010 IEP team had considerable information upon which it based its determination of Student's unique needs and goals. The June 1, 2010 IEP contained thirteen goals addressing Student's unique needs in communication, reading, writing, math and social/emotional behavior. In addition, the IEP contained 15 accommodations recommended by Baboglian designed to address Student's unique needs. The evidence also established that placement at a District school was appropriate because District teachers and staff understood Student's unique needs and they were qualified to deliver instruction to Student. Student's June 1, 2010 IEP offer was reasonably calculated to

provide Student with academic and non-academic benefit, including providing interaction with typically developing peers during the general education portion of his day.

26. Student is not contending that Student should have been placed in general education. Instead, Student is contending that he required a more restrictive placement to meet his needs. Where, as in this case, the evidence established that Student cannot be educated in a general education environment, the LRE analysis requires determining whether Student has been mainstreamed to the maximum extent that is appropriate in light of the continuum of options. District was not required to offer Student placement at a NPS preferred by Parents, even if that program would result in greater educational benefit to the student. District's offer of placement of Student for the 2010-2011 school year in a SDC with related services and 28 percent mainstreaming in general education was appropriate on the continuum of placements, was the LRE, and provided a FAPE. (Factual Findings 5, 8-63; Legal Conclusions 1, 6-13, 24, 25, 26.)

Issue 2b – Related Services

27. Student failed to meet his burden by a preponderance of evidence that District denied Student a FAPE for the 2010-2011 school year because the related services of 67 minutes per week of speech therapy, and 60 minutes per week of behavior intervention were inadequate to address his unique needs.

28. The evidence established that, based upon Parents' concerns about Student's progress and levels of performance, District conducted an early triennial multi-disciplinary assessment of Student in order to reassess Student's unique needs. It convened Student's triennial IEP four months early. The June 1, 2010 IEP team met and discussed Student's unique needs and his PLOPS based upon triennial assessment reports and input from Student's teachers and speech therapist. The IEP offered related

services in SL, behavior intervention, and a social skills class to address Student's unique needs in social behavior.

29. Regarding the amount of SL services offered by District for the 2010-2011 school year, Student did not offer any credible evidence that District's offer of 67 minutes per week of group SL services was insufficient to address Student's unique needs, or that some other amount of services was sufficient. On the contrary, sixty-seven minutes per week of SL services in a small-group setting was sufficient for Student to obtain educational benefit. The evidence substantiates that, during the past two years, Student progressed toward his communication goals, and that Student would continue to receive instruction and support in communication during his special education academic classes, during general education PE, and during lunch and recess.

30. Student also did not offer any credible evidence that the District's offer of 60 minutes per week of behavior intervention and 47 minutes a day in a social skills class was insufficient to address Student's social/emotional needs. Student demonstrated progress in his social skills during the 2009-2010 school year, even after Student's IEP was amended in March 2010 to remove the behavior intervention services at Parents' request. Based upon the 2010 assessments, the District designed a behavior program intended to address Student's unique social/emotional needs, and offered services that were sufficient and designed to address Student's needs in SL.

31. The evidence established that District's offer of services in its June 1, 2010 IEP offered Student a FAPE. (Factual Findings 1, 35-57, 61-63; Legal Conclusions 1, 6-10.)

ORDER

All of Student's claims for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all of the issues that were heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: April 16, 2020

_____/s/____

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings